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96310—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 63

UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court appears at R. 4.

JURISDICTION

The order of the District Court sustaining the demurrer to the indictment was entered April 14, 1936 (R. 4). The appeal to this Court was applied for and allowed on the same day (R. 5–6). The jurisdiction of this Court is invoked under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and under

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction in this case to the hearing of the case on the merits.

QUESTIONS PRESENTED

1. Whether the filing of an opinion by the court below in sustaining a demurrer to the indictment was a rendition of its "decision or judgment" within the meaning of the Criminal Appeals Act, so that an appeal was required to be taken within 30 days thereafter rather than within 30 days after the entry of the order sustaining the demurrer.

2. Whether the manufacture and sale of two-quart hampers for fruits and vegetables is in contravention of the Standard Container Act of 1928.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the Government's brief in the case of *United States of America, Appellant* v. *Resnick,* No. 62, which will be argued with the present case.

STATEMENT

On September 11, 1935, the appellee was indicted in the United States District Court for the Eastern District of Pennsylvania on two counts charging the manufacture and sale of two-quart metal hampers in violation of the Act of Congress of

May 21, 1928, otherwise known as the Standard Container Act of 1928 (R. 1–2).

The appellee demurred to this indictment on the ground, among others, that the Act did not apply to the manufacture and sale of two-quart hampers (R. 3).

On March 11, 1936, the District Court filed a memorandum opinion in which it held that its opinion in the *Resnick* case was controlling and that the demurrer should be sustained (R. 4). The only ground upon which the court sustained the demurrer in the *Resnick* case was that the Act of 1928 did not apply to hampers of a smaller size than one-eighth of a bushel or 4 quarts. On April 14, 1936, the District Court entered its order sustaining the demurrer to the indictment and discharging the appellee (R. 4). On the same day the Government petitioned for an appeal (R. 5), filing with its petition an assignment of errors (R. 6) and a statement of jurisdiction pursuant to Rule 12 of this Court. Also on the same day the District Court allowed the appeal (R. 5). Thereafter a statement opposing jurisdiction was filed below by the appellee, in which it moved to dismiss the appeal on the ground that the appeal was not taken in time because not applied for within 30 days after the rendition of the opinion of the District Court on March 11, 1936, and in which it also, in the event that its motion to dismiss was denied, moved to affirm on the ground that the question

of the construction of the statute was not substantial because the District Court had given the same construction to the statute as had this Court in *Pacific States Co.* v. *White,* 296 U. S. 176. In reply, the Government filed a memorandum in opposition to the motion to dismiss or affirm. On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits.

SPECIFICATION OF ERRORS TO BE URGED[1]

1. The District Court erred in holding that the Standard Container Act of 1928 was inapplicable to the manufacture and sale of two-quart size hampers for fruits and vegetables.

2. The District Court erred in sustaining the demurrer to the indictment.

DISCUSSION

As this case presents the identical questions which are involved in the case of *United States of America, Appellant* v. *Resnick,* No. 62, which will be argued with the present case, the Court is respectfully referred to the Government's brief in the *Resnick* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Resnick* case, it is respectfully submitted

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[1] See stipulation, approved by the District Court, amending Government's assignment of errors *nunc pro tunc* (R. 8).

that the judgment of the court below sustaining the demurrer to the indictment in the instant case should be reversed.

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